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=IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28-07-2005

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE N. KANNADASDAN

L.P.A.NO.18 OF 2001

P.R. Kannaiyan (died)
2. Jayalakshmi
3. Kamala
4. K. Mohanraj
5. K. Karunakaran
6. K. Girija
7. K. Umakanthan
8. K. Ruckmangathan

Appellants 2 to 8 brought on record as LRs of the deceased / sole appellant as per order dt.8.1.2003 in CMP.No.21738 of 2001 .. Appellants/Plaintiff & LRS of Plaintiff Defendant

Vs.

1. Ramasamy Mandiri
   S/o. Govinda Mandiri

2. V.R. Rajan
   S/o. Ramasamy Mandiri

3. Ethiraj
   S/o. Ramasamy Mandiri

4. Rajammal
   W/o. Thangavelu Mudaliar

5. Palani,
   S/o. Thangavelu Mudaliar

6. Malliga
   W/o. Thanikachalam

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7. Vadivel
S/o. Thangavelu Mudaliar

8. Punitha
W/o. Munirathinam

9. Nagamani,
W/o. Jagannathan

10. Senthamarai,
W/o. Sudhakar

11. Vasudevan
S/o. Ramasamy Mandiri .. Respondents /Defendants 1 to 3 & 4 to 10 LRS 6th Defendants & 4th Defendants

Letter Patent Appeal filed under Clause 15 of the Letters Patent against the judgment and decree of the learned single Judge in A.S.No.916 of 1985 dated 20.7.1999, allowing the appeal in so far as Item Nos.9 and 17 and dismissing the suit in respect of those items.(OS.392/79, on the file of the Additional Subordinate Judge, Vellore).

For Appellants : Mr.V. Raghavachari

For Respondents 4-10: Mrs.N. Mala for Mr.M.S. Umapathy
Respondent-3 : No Appearance
RR 1 & 2 : died(T.E)
R 11 : not ready - Notice.

J U D G M E N T

P.K.MISRA, J.

The present appeal under Clause 15 of the Letters Patent was filed by the plaintiff. During pendency of the appeal, on his death, the legal representatives have been impleaded as appellants 2 to 8. The appeal is confined to items 9 and 17 of the suit schedule.

2. The suit was filed for partition claiming 1/5th share in the suit schedule properties. The trial court had decreed the suit in part in respect of items 1, 2, 3, 6 to 18, 20, 22 to 24 and 28 and rejected the claim for partition in respect of items 4, 5, 19, 21, 25 to 27, 29, 30, 31 and 32 of the suit schedule

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properties. The plaintiff was arrayed as the first respondent and defendants 4 and 5 were arrayed as respondents 2 and 3 in the first appeal. Even though the appeal was filed in respect of the decreed items of property, as apparent from the judgment of the learned single Judge, at the time of final hearing, the appellants before the single Judge confined their submissions with regard to items 9 and 17 of the suit schedule properties. A cross-objection had been filed by the plaintiff as well as Defendant No.4 claiming that the suit should have been decreed in respect of items 4, 5, 19, 21, 25 to 27, 29, 30, 31 and 32 of the suit schedule properties.

3. Learned single Judge allowed the appeal in relation to items 9 and 17 and held that such properties were self-acquired properties of defendants 1 and 2 respectively and were not liable to be partitioned. Learned single Judge however confirmed the part decree for partition in respect of other properties. Learned single Judge also dismissed the cross-objection in respect of the properties for which the suit for partition had been dismissed. Learned single Judge also found that dismissal of the suit in respect of item 19, which was found to have been purchased by Defendant No.5, could not be challenged as such Defendant No.5 was not arrayed as a party in the cross-objection. The present appeal at the instance of the plaintiff is confined to items 9 and 17 of the suit schedule properties. Therefore, the decree of the trial court as confirmed by the learned single Judge has become final so far as all the properties save and except items 9 and 17.

4. At this stage, it is profitable to notice the relationship between the parties as described in the suit and it is not necessary to notice in detail the subsequent substitutions which have taken place either at the time of first appeal before the learned single Judge or during pendency of the appeal before the Division Bench, save and except stating that the plaintiff who had filed the present appeal having been expired, his legal representatives have been substituted. The original plaintiff and defendants 2 to 4 are the sons of Defendant No.1, and Defendant No.5 is the daughter of Defendant No.1.

5. As per the plaintiff’s case, item No.9 of the suit schedule property was purchased in the name of Defendant No.1, who was the Karta of the family at that stage, with the help of the joint family income and subsequently item No.17 was purchased from and out of the joint family income in the name of Defendant No.2.

6. During pendency of the suit for partition before the trial court, item No.9 of the plaint schedule was purchased by Defendant No.6, who was subsequently impleaded as a party in the suit. The case of the Defendant No.1 is that the joint family property was not sufficient to maintain the family and as such,

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there was no surplus and the property covered under item No.9 was purchased by him from out of his separate means. It was stated that certain properties had been gifted to him by his paternal uncle and he was also cultivating certain lands as a cultivating tenant. So far as item No.17 is concerned, the specific plea was that Defendant No.2 was a teacher and he had purchased the said property from out of his own means.

7. The trial court found that the property which had been allegedly gifted by the paternal uncle of the first defendant was in fact blended with the joint family properties and as such, such property was liable to be partitioned. It was further held by the trial court that since there was no other property of Defendant No.1 and the properties had been blended, the property under item Nos.9 and 17 had been purchased out of the joint family income and as such they were liable to be partitioned.

8. Learned single Judge has reversed the findings of the trial court so far as they relate to item Nos.9 and 17 are concerned by observing that the plaintiff was required to prove his case and in the absence of any categorical evidence with regard to surplus from the joint family property and since the properties under item Nos.9 and 17 were recorded in the name of defendants 1 and 2 respectively, the decree for partition in respect of such properties cannot be sustained. In view of the above conclusion, the learned single Judge further observed that the alienation made by Defendant No.1 in favour of Defendant No,.6 during pendency of the suit could not be challenged.

9. Learned counsel appearing for the appellants, who are the legal representatives of the original appellant, has raised the following contentions :-

(i) Kasthuri, daughter of Defendant No.1, who was originally impleaded as Respondent No.5 in the appeal filed by defendants 1 to 3 and 6, was given up during pendency of such appeal before the learned single Judge and the suit being one for partition, in the absence of a co-sharer, the appeal had become incompetent, more particularly when during pendency of the first appeal before the learned single Judge, the original Defendant No.1, the father, had expired, and as such the fifth defendant had right to succeed along with others to the properties of the deceased, who was Respondent No.1 in the appeal before the learned single Judge.

(ii) The property under item No.9 had been purchased in the name of Defendant No.1 at a stage when he was admittedly Karta of the family and even assuming that there was no sufficient

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surplus from the joint family property, in the absence of any independent source of income for Defendant No.1, such acquisition must be taken to be from the income of the joint family property of which admittedly the Defendant No.1 was in actual possession as Karta.

(iii) There was no evidence that there had been any partition between the father and uncle of Defendant No.1, and the property, which was allegedly obtained from the paternal uncle of defendant No.1, must be taken to be the joint family property and at any rate such property had been blended with the joint family properties and as such keeping in view the extent of such property, it must be taken that there was sufficient surplus to purchase the properties under item Nos.9 and 17.

10. Learned counsel appearing for the respondents supported the decision of the learned single Judge and has submitted that in fact the learned single Judge has discarded the story of blending and has rightly come to the conclusion that there was no surplus and the plaintiff had failed to prove his case.

11. Coming to the first contention, it is the submission of the learned counsel appearing for the appellant that Defendant No.5, the daughter, being a co-sharer, particularly after the death of Defendant No.1 the appeal had become incompetent in her absence, and therefore, the learned single Judge should not have interfered with the decree of the trial court in respect of item Nos.9 and 17, particularly when the learned single Judge rejected the cross-objection of the plaintiff and Defendant No.4 in respect of item No.19 on the ground that Defendant No.5 was not a party to the cross-objection. In support of his contention that in the absence of co-sharer, a suit for partition is not maintainable and it is liable to be dismissed on such ground alone, he has cited several decisions including the decision of the Supreme Court reported in AIR 1965 SC 271 (KANAKARATHANAMMAL v. V.S. LOGANATHA MUDALIAR). There is no necessity to refer specifically to the principles discussed in such decision and other similar decisions cited by him as the aforesaid proposition is a well settled principle of law. However, it has to be seen whether such principle has any application to the present case.

12. It has to be borne in mind that defendant No.5 had been included as a defendant not because she was one of the co-sharers in the joint family property (Amendment conferring such right on unmarried daughters came much later). She was impleaded as a party because in one of the properties, i.e., item No.19, the sale deed stood in her name and the contention of the plaintiff is that such property was acquired from the income of the joint family properties in the name of the daughter. Such contention of the plaintiff had been rejected by the trial court and the suit had

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been dismissed in respect of such claim. Appeal was filed by some of the other defendants because as per the other defendants, other separate properties were directed to be partitioned. In other words, the defendants, who had filed the appeal, had no grievance at all against the dismissal of the suit for partition in respect of item No.19. This being the position, defendants 1 to 3 and 6 had rightly given up Defendant No.5 in their first appeal filed before the learned single Judge. Dismissal of the cross-objection on the ground that Defendant No.5 was not a party to the cross-objection was obviously correct and at any rate, no further appeal had been filed by the plaintiff or Defendant No.4, who were the cross-appellants.

13. It was also contended that whatever might have been the position at the time of filing the appeal, after the death of Defendant No.1, who was Appellant No.1 in the appeal, Defendant No.5, who had already been given up as a respondent, should have been served with notice in view of her changed capacity. However, such contention cannot hold any water in the peculiar facts and circumstances of the present case. Defendant No.5 had in fact supported the stand of Defendants 1 and 2 to the effect that item Nos.9 and 17 were the self-acquired properties of defendant Nos.1 and 2 respectively. In view of such stand, even if she would have been specifically served with notice in her capacity as a legal representative of Defendant No.1, there would have been no occasion for her to claim any independent right inconsistent with her original stand. Moreover, her interest can be said to have been substantially represented by other defendants, namely, defendants 2 and 3, who had taken similar plea. In such view of the matter, the plaintiff / appellant cannot derive any benefit by taking shelter under a technical plea, more specifically so, keeping in view his stand vis-a-vis the stand of Defendant No.5. The first contention is therefore liable to fail.

14. The second and third contentions being inter-connected, may be conveniently taken up together. The submission of the learned counsel for the appellant is to the effect that in view of the finding that several other properties, apart from item No.13, are also joint family properties, it must be taken that the joint family had sufficient surplus, and therefore, the property under item Nos.9 and 17 could have been purchased from out of such joint family property surplus and in the absence of any specific proof by Defendants 1 and 2 that such property had been purchased from out of their separate funds, they must be taken to be the joint family properties as was done by the trial court. He has further submitted that without keeping in view the settled principle of law on this aspect, the learned single Judge has discarded such contention merely on the footing that the plaintiff had failed to prove his case.

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15. From the materials on record it appears that there is no dispute that item No.13 was admittedly the ancestral property. It is the specific case of Defendant No.1 that such property was given to him in partition. The extent of property is hardly less than two acres. Defendant No.1 in his evidence has categorically stated that income from such property was not sufficient to maintain the family. In the absence of any specific cross-examination elucidating anything contrary, it cannot be said that there was any surplus income from such meagre property, which was sufficient for acquiring other properties. Therefore, so far as the property purchased by Defendant No.2 is concerned, the presumption that if there is sufficient nucleus the acquisition by a member of the joint family can be said to be from out of such surplus is not attracted. Apart from the above, it is admitted that Defendant No.2 was employed as a teacher, and therefore, he had independent source of income.

16. The contention of the counsel for the appellant that in view of the finding of the trial court that other properties were blended with joint family properties, the extent of joint family property thereby became much bigger, and therefore, sufficient to generate sufficient surplus, though attractive, is also not acceptable. It is of course true that the trial court has passed a decree for partition in respect of several properties including the property given to Defendant No.1 by his paternal uncle on the footing that the properties had been blended with joint family properties. However, in the absence of any specific evidence, it cannot be assumed that by the time of acquisition by Defendant No.2 the property has been blended. Therefore, it is difficult to come to any conclusion that because of the bigger extent of the joint family properties there was sufficient surplus making it possible for purchase of property relating to item No.17.

17. So far as the property in the name of Defendant No.1 is concerned, the learned counsel appearing for the appellant has submitted that Defendant No.1 as admittedly being Karta and there being no separate income, and even assuming that there is no sufficient surplus from the joint family property, the burden is on Defendant No.1 to prove that such property had been acquired without the help of the joint family properties.

18. The general rule applicable to presumptions relating to joint family properties have been stated and restated in many decisions. In A.I.R. 1947 Privy Council 189 (APPALASWAMI v. SURYANARAYANAMURTHI AND OTHERS), it was observed :-

> "11. ... Proof of the existence of a joint family does not lead to the presumption that property held by any

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member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. ..."

19. In A.I.R. 1954 SC 379 (SRINIVAS KRISHNARAO KANGO v. NARAYAN DEVJI KANGO AND OTHERS), the Supreme Court cited the aforesaid observation from the decision of the Privy Council with approval and went on to add :-

> "10. Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law, but questions of fact to be determined on the evidence in the case."

20. Similar views were expressed in AIR 1969 SC 1076 (MUDIGOWDA v. RAMACHANDRA).

21. In a later decision of the Supreme Court reported in (2003) 10 SCC 310 (D.S. LAKSHMAIAH AND ANOTHER v. L. BALASUBRAMANYAM AND ANOTHER), all such earlier decisions have been noticed and the same principle has been reiterated.

22. The above well settled principle is accepted by all concerned. However, the learned counsel appearing for the appellant has submitted that in addition to such general principle, which is applicable to acquisition by a junior member of the coparcenary as well as the manager or kartha of the coparcenary, a further principle is applicable in case acquisition is by the kartha himself. He has submitted that even where the existence of some income yielding property is proved and yet the person is unable to prove that claiming that there is sufficient surplus from

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the income of the joint family property, if it is proved that karta or the manager had no independent source of income, such acquisition should be presumed to be out of the joint family at the disposal of the kartha and it is for the kartha to prove that the property is his own separate acquisition. For the aforesaid purpose, learned counsel for the appellant has placed reliance upon the decision of the Supreme Court reported in A.I.R. 1961 SC 1268 (MALLESAPPA BANDEPPA DESAI AND ANOTHER v. DESAI MALLAPPA alias MALLESAPPA AND ANOTHER) and the decision of a learned single Judge of this Court reported in A.I.R. 1977 MADRAS 171 (SANKARANARAYANAN AND ANOTHER v. THE OFFICIAL RECEIVER, TIRUNELVELI AND OTHERS) and also certain observations made in several other decisions subsequently.

23. Learned counsel appearing for the respondents on the other hand has combated these aspects of the submission and submitted that unless it is proved that there was sufficient surplus out of the joint family property, no such presumption can be raised even if the property is acquired in the name of the kartha. For the aforesaid purpose, she has placed reliance upon the decisions reported in 1998-2-L.W.259 (MUNIAPPA NAICKER v. BALAKRISHNA NAICKER), 1999-2-L.W. 713 (AMIRTHALINGAM v. UTHAYATHAMMA AND 15 OTHERS) and 2002-3-L.W. 809 (RANGANAYAKI AMMAL & 4 OTHERS v. V. BALAKRISHNA NAIDU & 24 OTHERS).

24. In AIR 1961 SC 1268 (cited supra) it was observed:-

> "15. In this connection it is necessary to bear in mind that respondent-1 has not shown by any reliable evidence that the expenses for the said litigation were borne by him out of his pocket. It is true that both the courts have found that respondent-1 purchased certain properties for Rs.600/- in 1925 (Ex.B-4). We do not know what the income of the said properties was; obviously it could be on any significant order; but, in our opinion there is no doubt that where a manager claims that any immovable property has been acquired by him with his own separate funds and not with the help of the joint family funds of which he was in possession and charge, it is for him to prove by clear and satisfactory evidence his plea that the purchase money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his coparceners."
>
> (Emphasis added)

25. This decision of the Supreme Court was followed in A.I.R. 1977 MADRAS 171 (cited supra)

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26. The observations in 1994 LW 273 (SONNAPPA IYER v. K.R. RAMUTHAIAMMAL AND 6 OTHERS) to the following effect:-

> "... Thus, the evidence on record conclusively shows that the first defendant had ancestral properties comprising of houses and was running a business which was also ancestral. He had no other source of income with which he could have purchased properties of his own. When there is no evidence as to his independent source of income and when he admittedly was the manager of the undivided family consisting of himself and his sons, the presumption under the Hindu Law has to be drawn and the property should be presumed to be joint family property. ..." (Emphasis added)

also supports the stand of the appellant.

27. In 1996-2-L.W. 422 (THAMBIRAN NAICKER AND ANOTHER v. DURAISWAMY NAICKER AND 10 OTHERS), a learned single Judge relying upon the latter observation in 1994 LW 273, observed :-

> "15. ... The defendants who are in management are bound to account the management and their possession is that of a Trustee. It is for them to prove that no part of the family income was made use of for acquiring C Schedule items. A similar question came for consideration by this Court, and the same is reported in 1994-I-M.L.J.44 = 1994-1-L.W. 273 (Sonnappa Iyer V. K.R. Ramuthaiammal and others)..."

28. However, in the two later decisions, namely, 1998-2-LW 259 and 1999-2-LW 713 (cited supra) the very same learned Judge seems to have taken a slightly different view by recounting the general principle applicable as reflected in the decisions AIR 1947 P.C. 189, AIR 1954 SC 379 and AIR 1969 SC 1076.

29. Apart from the aforesaid decisions, which have been cited at the bar, we have come across several decisions of this Court and one decision of Allahabad High Court. In AIR 1950 Allahabad 54 (BHAGWANT KISHORE AND ANOTHER v. BISHAMBHAR NATH AND OTHERS), it was observed :-

> " 4. As already observed Har Narain was possessed of some ancestral property, which was the right to receive a moiety share of the offerings. Har Narain was the karta or the manager of the joint Hindu family consisting of himself and his sons. I have not the least doubt that when a purchase is made by the karta or manager of a joint Hindu family and it is proved that he was in receipt of an income on behalf of the joint Hindu family,

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and it is not proved that he had any separate source of income, the presumption to be made is that the purchase was made by the karta on behalf of the family from family funds, unless the contrary is proved.

5. Learned counsel contends that it is not enough to prove that the family had some income but before the presumption can be made it should be proved that the income was such as to leave a surplus available for the purchase. I am aware of the rulings in which it has been held that the mere existence of ancestral nucleus is not enough but that it must be proved that the nucleus was a fruitful nucleus, namely that the nucleus was such as to give rise to a presumption that the purchase might have been made out of it. But if I am not mistaken it was definitely proved in all these cases that the nucleus was so meagre that the purchase could not have been made out of that. The further question upon which the decision of this case depends is that if it is not known either way, whether the nucleus was so meagre that the purchase could not be made out of it or whether the nucleus was sufficient to enable the purchase to be made, what is the presumption to be made about it. In my opinion when no other source of income is disclosed from which the property could be purchased and all that is known is that the family possessed some ancestral nucleus the presumption to be made is that the nucleus was sufficient to enable the purchase of the property to be made. I have, therefore, come to the conclusion that the finding of the lower appellate Court with regard to the nature of the property, namely that it is joint family property is not vitiated by any error of law."

30. In Appeal No.75 of 1973 (RAMIAH & ANOTHER v. PECHI AMMAL & OTHERS) {reported in 1977 TLNJ 7}, disposed of on 18.11.1976, a Division Bench of this Court after noticing the general principle that if a coparcener comes to Court asserting certain properties standing in the name of another member of the family should be brought to the hotchpot for the purpose of division, then the burden is on the challenging coparcener to prove by material and clinching evidence that the source of purchase price of that properties in the name of the challenged coparcener emanated from the surplus income of the admitted joint family properties, observed :-

"... These general observations are susceptible to an exception, if the challenged co-parcener is the manager. If the properties are acquired by a manager of a Hindu Joint family and if those properties stand in his

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name and if such acquisitions are made in the course of his management as manager of the joint family, then the burden shifts on him to establish that such properties are his own and they are not joint family properties. In a case where such acquisitions are questioned, it is not for the challenging co-parcener to establish as already expressed by us; but it is for the challenging manager to show by independent evidence that the acquisitions made by him and in his name are the result of an independent activity of his, totally unconnected with the joint family nucleus or its income. These are well-established propositions. In 162(2) M.L.J. 154, the Supreme Court had occasion to consider nature and content of the burden of proof in such situations. It expressed the view that where the manager claims any immoveable property acquired by him with his separate funds and not with the help of the joint family funds of which he was in possession and charge, it was for him to prove by clear and satisfactory evidence his plea that the purchase-money proceeded from his separate fund. The onus of proof must in such a case be placed on the manager and not on his co-parceners. There is, therefore, high authority for the proposition that it is for the first defendant whom we have characterised as the manager of the present joint family to prove that any acquisitions standing in his name are his properties."

31. The decision of the Supreme Court in AIR 1961 SC 1268 and the subsequent Division Bench decision in 1977 TNLJ 7 was followed by a learned single Judge in 1984 (VOL.97)-LW-406, wherein after recognising the general principle, exception in the case of acquisition by the manager was recognised. It was observed :-

" 10. ... Therefore, even though the respondents have not proved what was the income derived from the joint family property and what amount would have remained as surplus after the expenses of the joint family had been met, there is a high degree of possibility that there must have been some surplus and that the properties must have been yielding adequate income for supporting all the members of the family. In such circumstances there is certainly scope for inferring that there should have been certain amount of surplus and from out of the surplus, the suit property might have been purchased."

32. In 1993(2) MLJ 613 (K.V. DURAISAMY AND ANOTHER v. D. PERUMALSAMY (MINOR) AND ANOTHER), after coming to the conclusion that there was some joint family nucleus, it was observed :-

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> "8. ... Since he was the manager of the family at the time of acquisition of the lands, as it has been laid down by the Supreme Court in Nallasappa v. Mallappa, A.I.R. 1961 S.C. 1268, it is for him to prove by clear and satisfactory evidence that the lands were acquired by him with his own separate funds and not with the help of joint family funds of which he was in possession and charge. The onus of proof must in such a case be placed on the manager and not on the coparceners. ..."

33. The fine distinction in such matters seems to have been recognised by a Division Bench of this Court in (2002)3 M.L.J. 187 (M. RANGAMMAL AND OTHERS v. B. BALAVENKATESAN), wherein it was observed :-

> "26. ... We cannot therefore accept Mr. Srinivasan's arguments as regards the nature of the properties on the ground that there is no evidence with regard to the income from the leasehold property. This proposition goes against the very grain of the concept of Hindu Joint Family. Being the joint family Manager he has certain advantages as well as handicaps. In contradistinction to a property standing in the name of a junior member being treated as his separate acquisition, unless the contrary is proved, in the case of the Kartha it is the other way about and if he has to claim any real estate standing in his name as his own he has to do a lot of explaining how he had not touched the joint family funds for acquiring it, and utilised his own independent means which was always so identifiable, how he had brought it into the common hotchpot and so on and so forth, he or persons claiming under him as his separate property have a tough job ahead."

34. This slight distinction in the matter relating to presumption in respect of the property acquired by the kartha seems to have been recognised in Mayne's Treatise on "Hindu Law & Usage", 14th Edition (1996), page 653, wherein while concluding that onus is on the coparcener to prove nucleus, it has been observed :-

> "... The case of the manager however is somewhat different from that of the ordinary coparcener. Where there is an acquisition by the manager in his own name and there is no independent source of income, the presumption arises that the new acquisition was joint family property. Where the manager claims that what is acquired is his separate property he should prove that he had acquired it with his separate funds."

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35. It may be noticed that in the decision of the Supreme Court reported in (2003) 10 SCC 310 (cited supra), the decision reported in AIR 1961 SC 1268 (cited supra) has been distinguished on facts, but the learned Judges have not disapproved of such decision.

36. In the decisions of the learned single Judge, relied upon by the counsel for the respondents, there is no reference to earlier decision reported in AIR 1977 Madras 171 nor there is any reference to the decision of the Division Bench reported in summary form in 1977 TLNJ 7 (cited supra) Similarly, the decision of the Supreme Court in AIR 1961 SC 1268 seems to have not been noticed. From the decisions of the Supreme Court in AIR 1961 SC 1268, AIR 1977 Madras 171 and also from the observations made by the Allahabad High Court in AIR 1950 Allahabad 54 and in Mayne's Treatise on "Hindu Law & Usage", and all other decisions noticed above, it is apparent that an exception is carved out in the matter relating to acquisition in the name of Karta, where it is proved that Karta had no independent income and he is in possession of some nucleus and not necessarily sufficient nucleus of the joint family property. In such a case, even where sufficient nucleus is not proved but existence of some nucleus is proved and it is further proved that Karta or Manager, in whose name property had been purchased, had no independent income, the burden is shifted to the Karta to prove that the property has been acquired without the aid of the joint family and with the own separate income of the Karta or the Manager. We hasten to add that such principle is inapplicable, where it is shown that Karta has some separate and independent income, in which event, the normal principle that it is for the person claiming a particular acquisition to the joint family property to prove that there was sufficient surplus from the joint family property from out of which the property in question could have been acquired.

37. The decisions relied upon by the counsel for the respondents to the extent that they have ignored this exception based on AIR 1961 SC 1268 must be taken to have stated the position of law in general way.

38. Though the proposition of law advanced by the learned counsel for the appellant is accepted and in that sense it can be said that he has won the "legal battle", we are afraid he has not won the war. In the present case, it is apparent that before acquisition of property relating to item No.9, the other properties have been settled with Defendant No.1 by his paternal uncle. Compared to the extent of the joint family property as well as the extent of the property acquired, the extent of such gifted property was much more. Thus, it cannot be said that at the time when acquisition was made in respect of property under item No.9, Karta

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had no other independent source of income. It is of course true that the property gifted by the paternal uncle of Defendant No.1 has been subjected to partition asper the decree of the trial court and such decree though initially challenged, has not been touched by the learned single Judge. In view of the finding of the trial court regarding blending, we accept the contention of the appellant is that there was blending of the property of Defendant No.1. However, still then it cannot be assumed that by the time of acquisition in 1931 such property had been blended. There is no specific evidence or finding as to when the blending took place. Therefore, it cannot be said that Defendant No.1 did not have any independent source of income. Apart from the above, defendant No.1 in his evidence has stated about his cultivation of other properties as a cultivating tenant. Even though the learned counsel for the appellant sought to challenge such evidence by contending that no documents have been produced, we do not find that such statement of Defendant No.1 has been in any way shaken in cross-examination. From the above, it is apparent that apart from meagre ancestral property, defendant No.1 had access to other agricultural properties as a donee and as a cultivating tenant. Therefore, the principle of law relied upon by the learned counsel for the appellant is of no avail.

39. In view of the above conclusions, the appeal is liable to be dismissed. However, there would be no order as to costs.

dpk

Sd/

Asst.Registrar

/true copy/

Sub Asst.Registrar

To
1. The Additional Subordinate Judge,
Vellore.

2. The S.A.R.Judicial Department,
High Court, Madras.

3. The Record Keeper, VR Section,
High Court, Madras.

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+1 CC to Mr.V.Raghavachari, Advocate, SR No.31638.

+1 CC to Mr.M.S.Umapathy, Advocate, SR No.31643.

AKM(C.O)
BG/12.08.2005.

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